

FILED BY CLERK

APR -9 2008

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

THOMAS EUGENE WAITE,

Appellant.

2 CA-CR 2006-0300  
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication  
Rule 111, Rules of  
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044897

Honorable Richard Nichols, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General  
By Randall M. Howe and Cassie Bray Woo

Phoenix  
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender  
By Nancy F. Jones

Tucson  
Attorneys for Appellant

H O W A R D, Presiding Judge.

¶1 Thomas Waite appeals his convictions and sentences on three counts of aggravated driving under the influence of alcohol. He was sentenced to concurrent prison terms, the longest of which are nine-year terms. Waite claims the trial court erred in denying a motion for a continuance, denying his request to seek private counsel, failing to strike certain jurors for cause, and instructing the jury pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). He also argues that the state presented insufficient evidence of his prior convictions, that the fact of his prior convictions should have been tried to a jury and that the court granted him an incorrect amount of presentence incarceration credit. The state concedes that the trial court incorrectly calculated the number of days of presentence incarceration, and we modify his sentence accordingly. We otherwise affirm his convictions and sentences.

### **Motion for Continuance**

¶2 Waite first argues the trial court erred in denying his motion to continue the trial, which he made on the first day of trial, claiming he needed to find and present a witness. We will not reverse a trial court's decision on a motion for continuance to secure the presence of a witness unless the defendant can clearly establish an abuse of discretion and prejudice. *See State v. Reynolds*, 123 Ariz. 117, 118, 597 P.2d 1020, 1021 (App. 1979). A trial court shall grant a continuance "only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice." Ariz. R. Crim. P. 8.5(b). Even the denial of a continuance that results in the absence of a material witness

“is well within the trial court’s discretion.” *See State v. Nadler*, 129 Ariz. 19, 22, 628 P.2d 56, 59 (App. 1981). A court generally does not abuse its discretion in denying a motion for continuance when the defendant has failed to act diligently in securing the attendance of a witness. *See State v. Richie*, 110 Ariz. 590, 592, 521 P.2d 1136, 1138 (1974).

¶3 Here, Waite was aware of the existence of an alleged witness at the time of the offense and apparently sent a statement from the witness to his attorney well before trial. Thus, Waite had the opportunity to investigate and secure the attendance of the witness but failed to do so.<sup>1</sup> Accordingly, Waite did not act diligently. *See Richie*, 110 Ariz. at 592, 521 P.2d at 1138; *see also Reynolds*, 123 Ariz. at 118, 597 P.2d at 1021 (listing factors to consider). In addition, at the time the court ruled on the motion, Waite did not state when the witness would be available and implicitly expressed doubt as to whether the information about the witness was reliable. And the trial court reasonably could have concluded that the last-minute continuance would have inconvenienced the court and other witnesses. *See Reynolds*, 123 Ariz. at 118, 597 P.2d at 1021. The court therefore did not abuse its discretion in denying Waite’s motion.

### **Request to Seek Private Counsel**

¶4 Waite next argues the court erred in denying his pro se request, made on the first day of trial, for permission to retain private counsel and for a continuance of two or

---

<sup>1</sup>To the extent Waite suggests his counsel was ineffective for failing to discover the witness’s statement, we note that such a claim may only be raised in a Rule 32, Ariz. R. Crim. P., proceeding. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

three days to accommodate the request. A defendant who does not require appointed counsel has a Sixth Amendment right to choose who will represent him, although that right is not absolute. *State v. Coghill*, 216 Ariz. 578, ¶ 40, 169 P.3d 942, 952 (App. 2007). The trial court “retain[s] ‘wide latitude’ in balancing the right to counsel of choice against the needs of the criminal justice system to fairness, court efficiency, and high ethical standards.” *Id.*, quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, \_\_\_, 126 S. Ct. 2557, 2565 (2006). A court may deny a defendant’s request to choose his own counsel when granting that request would “cause an unreasonable delay in the proceedings to allow adequate preparation.” *Robinson v. Hotham*, 211 Ariz. 165, ¶ 14, 118 P.3d 1129, 1133 (App. 2005); see also *Gonzalez-Lopez*, 548 U.S. at \_\_\_, 126 S. Ct. at 2565-66; *Morris v. Slappy*, 461 U.S. 1, 12-13 (1983).

¶5 Waite incorrectly suggests that the trial court refused him permission to hire private counsel. Waite stated below that he had already been trying to do that, but needed additional time. The trial court did not prevent Waite from hiring counsel of his choice; it simply refused to continue the trial to allow him additional time to do so.

¶6 As stated above, we review a court’s denial of a continuance for an abuse of discretion. See *State v. Hein*, 138 Ariz. 360, 368, 674 P.2d 1358, 1366 (1983). In order to grant a continuance, a court must find extraordinary circumstances and that a delay is essential to the interest of justice. Ariz. R. Crim. P. 8.5(b).

¶7 Waite had previously consulted with private counsel but had not retained him. He stated twice that a continuance would merely give him a “chance” to obtain private counsel, suggesting some doubt as to whether he would be successful. Moreover, we agree with the state’s argument that, if Waite did have the means to hire private counsel, such counsel would not have been prepared to proceed with trial within the “few days” that Waite was requesting. Waite did not show any extraordinary circumstances that would provide the grounds for a continuance, and the court did not abuse its discretion in denying Waite’s request as untimely.<sup>2</sup>

### **Jury Selection**

¶8 Waite next claims he was denied a fair and impartial jury because the trial judge refused to remove certain jurors for cause. Waite used his peremptory strikes to remove those jurors. Assuming, without deciding, that the court did err in refusing to strike the jurors to whom Waite had objected, we review the curative use of his peremptory challenges for harmless error. *State v. Hickman*, 205 Ariz. 192, ¶ 28, 68 P.3d 418, 424 (2003). The state points out that *Hickman* places the burden to show prejudice on the defendant. *Id.* Waite contends that when conducting a harmless error review, the state has the burden to prove beyond a reasonable doubt that the error did not contribute to or affect

---

<sup>2</sup>Because the court did not err in denying Waite’s request, we do not address Waite’s argument regarding structural error. *See Gonzalez-Lopez*, 548 U.S. at \_\_\_, 126 S. Ct. at 2564-66 (structural error occurs only when defendant is *erroneously* deprived of counsel of choice).

the verdict. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005). But we need not resolve this issue because Waite cannot prevail under either standard.

¶9 Waite identified Juror R. and Juror W. as jurors he would have struck if he had not used his peremptory challenges for curative purposes. Both jurors served on the panel.<sup>3</sup> The record shows these two jurors provided their names and basic background information during voir dire. They did not respond to any inquiries in a manner that would indicate bias or partiality. And when Waite made his objection, he merely stated, “these are not jurors that we normally would have chosen.” Because the record contains absolutely no evidence to suggest these jurors were either unfair or partial, we conclude that, regardless of who has the burden, any error was harmless beyond a reasonable doubt.

¶10 Waite in substance claims that the loss of the peremptory challenges constituted prejudice. But our supreme court has rejected that claim. *Hickman*, 205 Ariz. 192, ¶ 33-36, 68 P.3d at 426. Waite further claims the evidence of his guilt was not overwhelming, but, even if that argument were true, it does not show that replacing two impartial jurors with two other impartial jurors would have changed the result.

### ***Portillo* Instruction**

¶11 Waite next argues the court erred in giving the jury instruction on reasonable doubt pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). Because our

---

<sup>3</sup>Waite also identified a third juror that he would have struck, but this juror was ultimately selected as the alternate and excused before deliberations began.

supreme court has rejected similar arguments challenging this instruction, *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916, *cert. denied*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 506 (2006); *State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003), we conclude the trial court did not err in giving the *Portillo* instruction.

### **Sufficiency of the Evidence to Prove Prior Convictions**

¶12 Waite next argues the state presented insufficient evidence to prove his prior convictions for sentencing purposes because it relied on certified Arizona Department of Corrections (DOC) documents, known as a “pen pack,” without presenting documentation of the actual convictions. Relying on Arizona Supreme Court precedent, this court held in *State v. Robles*, 213 Ariz. 268, ¶ 17, 141 P.3d 748, 753 (App. 2006), that a “certified copy of the DOC documents showing [defendant’s] prior convictions as well as testimony that linked those records to him” was sufficient evidence to prove prior convictions. *See also State v. Nash*, 143 Ariz. 392, 403, 694 P.2d 222, 233 (1985). The state presented the requisite documentation and testimony, and we therefore reject Waite’s argument on this issue.

### **Prior Convictions Found by Court**

¶13 Waite next asserts his due process rights and right to a jury trial were violated when his prior convictions were found by the court instead of by a jury. Relying on precedent from our supreme court and the United States Supreme Court, this court has held

that prior convictions may be found by the court and that the issue does not need to be submitted to a jury. *State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 230 (App. 2005); *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *State v. Fell*, 210 Ariz. 554, ¶ 8, 115 P.3d 594, 597 (2005). We therefore reject Waite's argument on this issue.

### **Presentence Incarceration Credit**

¶14 Waite finally claims the trial court erred when it gave him credit for 135 days' presentence incarceration pursuant to A.R.S. § 13-709(B). Waite contends he is entitled to 143 days' credit. The state concedes that fundamental error occurred. A review of the record confirms the court erred. Pursuant to A.R.S. § 13-4037, we modify the sentence to grant Waite 143 days of presentence incarceration credit. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992).

### **Constitutional Claims**

¶15 Waite also attaches constitutionally based claims to several of his arguments. These claims were neither raised below nor adequately argued here. Therefore, they are forfeited and waived. *See State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006) (constitutional claim forfeited); *State v. Fernandez*, 216 Ariz. 545, n.2, 169 P.3d 641, 643 n.2 (App. 2007) (constitutional claim waived).



## Conclusion

¶16 For the foregoing reasons, we modify Waite's concurrent sentences to grant him a total of 143 days of presentence incarceration credit and otherwise affirm his convictions and sentences.

---

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

---

JOHN PELANDER, Chief Judge

---

J. WILLIAM BRAMMER, JR., Judge